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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-140

AGRASHELL, INC.,

Petitioner,

vs.

HAMMONS PRODUCTS COMPANY,

Respondent.

PETITIONER'S REPLY MEMORANDUM

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Respondent Hammons originally waived its right to file a brief in opposition to Agrashell's petition, asserting that it did so "in view of the obvious lack of merit in the petition".

A Brief in Opposition has now been filed by direction of the Court. Respondent's brief is most noteworthy for its failure to address either the substance of the Petition or the importance of the issues raised by the Petition. It is a diversion from the questioned rulings of the Court of Appeals and a rehash of arguments which that court rejected in the proceedings below.

Introduction

The cause of the present petition is two-fold.

First, the Court of Appeals let stand as proof of the alleged *fact* of antitrust injury to respondent's business a theory of a professional witness unacquainted with the

industry concerned [". . . we cannot say that as a matter of law Dr. Kuhlman's theory failed to demonstrate *the fact* . . . of damage" (Petition App. A, 25-26)], even though that theory was found to be "highly questionable" for having "many practical defects" constituting "serious failings" and to be based on "conclusively negated" assumptions of illegality in the Perry patent and in the suits Agrashell brought to remedy infringements of the patent.

Second, the Court of Appeals held that the jury could have considered in violation of § 1 of the Sherman Act, upon the expiration of the one patent involved, a simple agency agreement, terminable annually at the will of either party, for original sales on commission, at the manufacturer's announced price, of a specialty product which arose from the patent and during its term was being made and sold under the patent.

I. Question 1, as to the sufficiency for proving the fact of damage of respondent's theoretical evidence of the alleged loss of business

Respondent's brief tries to make it appear that Question 1 of the petition does not exist on the record.

In so doing, respondent flies in the face of the opinion of the Court of Appeals, which was rendered "[a]fter a careful review of all of the pleadings, testimony and exhibits" (App. A, 15). Upon that review, the Court found that the jury award of $41,750.00 in damages "was apparently based upon evidence adduced by Dr. Kuhlman, an economist" (App. A, 14). The Court expressly found that Hammons prospered and made gains in the sale of its product, and that "*Hammons' evidence of damages was adduced from the expert testimony*" (App. A, 20). The issue as to proof of the alleged fact of damage turned squarely on the legal sufficiency of this "*expert testimony concerning its damages and* the computation thereof" (App. A, 19).

The Court proceeded with five printed pages of careful analyses, which show the economist's damage theory to be thoroughly misfounded and defective, and then stated:

> "We have described some of the serious failings of Dr. Kuhlman's damage testimony to indicate our hesitancy to allow a jury to assess damages upon such a theory" (App. A, 24).

But then, upon remarking that "[o]ur critique . . . must be tempered . . . by the Supreme Court's statements relating to the proper function of an appellate court", the Court of Appeals let the theory stand as the only affirmable basis for the damage judgment, stating:

> "With these principles in mind we cannot say that as a matter of law Dr. Kuhlman's theory failed to demonstrate the fact or the quantum of damage with sufficient clarity. For these reasons the jury award of $41,750.00 must stand" (App. A, 25-26).

In these circumstances, it defies credulity for respondent to assert as it does that Question 1 is not presented by the record.

Respondent also overreaches in contending that "no confusion or conflict exists in the applicable law." This is refuted by the confusion evident in the opinion below. It has let principles which arose in regard to the computation of *amount* of damage support a verdict based on a merely theoretical postulation of both *the fact* and the amount of alleged injury to Hammons' business.

As the petition points out on pages 12-16, the ruling below not only involves confusion but also conflicts with the standards of proof of caused business injury which were enunciated in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931), and in *Zenith Corp.* v. *Hazeltine*, 395 U.S. 100, 114 n.9, 126-127 (1968).

Furthermore, the role given to the discredited economist's theory in this case is in stark contrast to the total rejection of a similarly incredible economist's theory which occurred in *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 297 F.2d 906, 910 (2d Cir. 1962). In *Herman Schwabe,* as here, contrary to respondent's verbalized distinction, the expert's testimony attempted to prove both the fact of injury and the damage amount.

Many hundreds of antitrust treble damage claims are filed each year. No adequate guidance is found in the past decisions of this Court for determining whether, or to what extent, claimants may succeed in a growing tendency (which will obviously be nurtured by the decision below) to seek treble damages upon the theoretical testimony of a professional witness where is no evidence of any actual causation of injury to the claimant's business.

II. Question 2, as to the finding of a Sherman Act Section 1 violation by the Wheelabrator Commission Sales Contract

Here, again, respondent's brief conveniently bypasses the opinion of the Court of Appeals in contending that Question 2 is not presented by the record.

The Court of Appeals found the issue as to the Wheelabrator contract to be whether this contract, considered as a sales agency agreement "*with its price fixing provision*", was legal "when viewed in the light of . . . *United States* v. *General Electric Co.*, . . . 272 U.S. at 488" (App. A, 16, 17)—conceding merit to Agrashell's allegations that Wheelabrator was not purchasing for resale but merely selling as an agent for Agrashell (App. A, 16) and, also, assuming that the contract was one of agency (App. A, 18).

The crux of the Court's ruling is that "whatever protection *General Electric* afforded the Wheelabrator contract ended when the patent expired", so that "the jury

could have correctly concluded that the Wheelabrator contract extended the life of the patent . . . in restraint of trade" (App. A, 18).

Petitioner emphasizes again that the contract was terminable annually on 60 days' notice.

Hammons had couched its attack on this contract upon arguments calling the contract a part of "exclusive-dealing arrangements", for "controlling SGA prices and excluding competition", which involved a "resale-price-maintenance feature".

The Court of Appeals found no basis for those arguments in the evidence, with the sole exception of the ruling that "the Wheelabrator contract with its price fixing provision" (even though it was a contract of agency within the "protection" of *General Electric* when made in 1950) could have been considered unlawful for having continued in effect after the patent expired.

Question 2 of the petition is, therefore, very clearly presented by the record.

The Court of Appeals did *not* find any basis for a conclusion of illegality in any provision of the Wheelabrator contract argued about in respondent's brief. Its only basis of decision was the "price fixing provision".

The other provisions that respondent argues about, moreover, are *not* what respondent contends they are. To illustrate:

> (1) Respondent characterizes as an "exclusive-dealing" commitment a contract provision (Petition App. B, ¶ 5, p. 37) which in the event of a *force majeure* would excuse failure of Agrashell to fill orders for its Shelblast product, and requiring Agrashell in such event to notify the agent who "shall then be free temporarily to obtain similar material for its requirements from other sources". This was a lim-

ited permission to duplicate Agrashell's patented product, not a commitment to deal exclusively with Agrashell or in its product.

(2) Respondent characterizes as "[denying] Wheelabrator authority to compete with Agrashell in selling to 'the rubber industry . . .'" a provision of the contract (App. B, ¶ 3, p. 36) which merely excepted certain industries from the "all classes of users" to whom the agent was authorized to sell "Shelblast, manufactured and produced by Agrashell". There plainly was no restraint or limitation of any kind on Wheelabrator's freedom to deal in or sell products competitive with Agrashell's—nor even any agreement by Wheelabrator that it would not sell the Shelblast product otherwise than as expressly authorized.

(3) Respondent characterizes as "[forbidding] Agrashell to make bids or sales at prices below those dictated to Wheelabrator" a provision of the contract (App. B, ¶ 10, p. 39) which merely protected Wheelabrator against price discrimination by requiring that the prices Agrashell quoted for sale of the Shelblast product through Wheelabrator would not be higher than those it quoted or used for other sales.

(4) Respondent characterizes as "an understanding that Wheelabrator would not compete with Agrashell for government contracts" certain memoranda (App. V, 78, 81) which merely noted that the price quotations on some Air Force requests would be "basic manufacturers bidding against basic manufacturers", without going through agents, so that a quotation by Wheelabrator "would not be *competitive*". There is no warrant for respondent's coloring characterization of those memoranda.

By coloring and distorting the Wheelabrator contract in ways which the Court of Appeals did not accept, respondent tries to turn aside the question of the legality

of this contract under the *General Electric* doctrine and to make it appear that the contract might have been held in violation of Section 1 by analogy to *United States* v. *Masonite*, 316 U.S. 265 (1962).

Mis-characterizations of the contract, however, afford no basis for equating this case with *Masonite*. Neither do they give any reason for this Court to deny review of the ruling by which the Court of Appeals struck down, as a Section 1 violation upon the expiration the patent for the product concerned, a simple agency contract for sales on commission of a manufacturer's product at his announced price.

CONCLUSION

The questions presented by the petition and the reasons stated in it for granting the writ are in all respects valid, meritorious, and unaffected by the arguments made in respondent's Brief in Opposition.

Agrashell's petition for a writ of certiorari should be granted.

Respectfully submitted,

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